UNITED STATES ANTI-DOPING AGENCY v. FLOYD LANDIS
American Arbitration Association No. 30 190 00847 06
North American Court of Arbitration for Sport Panel
Award Dated September 20, 2007

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Christopher L. Campbell, dissenting.

I.

INTRODUCTION

> **"Whoever is dishonest with very little will also be dishonest with much. . . So if you have not been trustworthy in handling worldly wealth, who will trust you with true riches . ."** *Luke 16:10.*

1. From the beginning, the Laboratoire National de Dépistage et du Dopage ("LNDD") has not been trustworthy. In this case, at every stage of testing it failed to comply with the procedures and methods for testing required by the International Standards for Laboratories, Version 4.0, August 2004 ("ISL") under the World Anti-Doping Code, 2003 ("WADA Code"). It also failed to abide by its legal and ethical obligations under the WADA Code. On the facts of this case, the LNDD should not be entrusted with Mr. Landis' career.

2. Mr. Landis is only required to prove the facts he alleges in this case by a mere balance of the probabilities.[1] In many instances, Mr. Landis sustained his burden of proof beyond a reasonable doubt. The documents supplied by LNDD are so filled with errors that they do not support an Adverse Analytical Finding. Mr. Landis should be found innocent.

[1] WADA Code (2003) ¶3.1.

II.

LEGAL ANALYSIS

A. Safeguarding The Interests Of The Athletes

3. Fifteen percent of the Arbitrators selected by CAS were selected "with a view to safeguard the interests of the athletes."[2] The WADA Code should be drafted to protect innocent athletes from improper methods or procedures. This dissent is written with the intent of "safeguarding the interest of athletes."

B. LNDD Submitted Improper Evidence of a Doping Violation

4. In order to ensure that the IRMS test (the so called gold standard test for steroids) on any particular sample is done correctly, quality control steps are included in a process that is called a sequence. These quality controls steps are critical.[3] Each step in the sequence is important to ensure the reliability of the test result.[4] The order in which the steps in the sequence are run is important.[5] They must be run in proper order.[6] Each step should be monitored in the testing process.[7]

5. A sequence could have nine steps. By way of example, lets give three differently run sequences the numbers 101, 102 and 103. In this example, the results from the nine steps in sequence 101 would be used to establish the reliability of the test results for sequence 101.

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[2] Code of Sports-related Arbitration/ Mediation Rules, Edition 2004, S14.

[3] Transcript of Proceedings at p. 556: 14-18., U.S. Anti-Doping Agnecy vs. Floyd Landis (30 190 00847 06) (testimony of Cynthia Mongongu) (May 16, 2007).

[4] *Id.* at p. 562:4-6.

[5] *Id.* at p. 561:22-25.

[6] *Id.* at pages 561:11-562:16.

[7] *Id.* at p. 562:7-13.

Conversely, the results from the nine steps in sequence 101 could not, and should not, be used to establish the reliability of the test results from sequence 102 or 103.

6. If one of the steps in sequence 101 is incorrect, then the test results from sequence 101 are not scientifically reliable. We should not be using them. Inserting the results from a step from sequence 102 into sequence 101 ("cherry picking") in order to mask a flaw and attempt to make sequence 101 appear reliable would be improper, and certainly insufficient evidence to establish an Adverse Analytical Finding ("AAF"). Such evidence should not be considered by this panel and may be fraudulent and/or perjurious when submitted in a proceeding to support an allegation intended to strip an athlete of his eligibility, competition results and good name.

7. Cherry picking data from different sequences is exactly what has occurred in the IRMS tests in this case.[8] In its document package, the LNDD submitted a sequence for Mr. Landis' A sample that have the results from steps taken is a different sequence.[9] We don't know which sequence because that evidence has been destroyed.[10] This fact represents a violation of ISL 5.4.4.4.1.4.[11] LNDD also did this for Landis' B sample.[12] A Laboratory Director would not be able to explain why there appeared to be this mixing of steps from different sequences.[13] This demonstrates a

[8]Landis' Proposed Finding of Fact and Conclusions of Law at pages 42-43 (¶¶9.4 through 9.9). U.S. Anti-Doping Agnecy vs. Floyd Landis (30 190 00847 06) (June 28, 2007).

[9]*Id.*

[10]*Id.*

[11]ISL 5.4.4.4.1.4 states: All data entry, recording of reporting processes and all changes to reported data shall be recorded with an audit trial. This shall include the date and time, the information that was changed, and the individual performing the task.

[12]*Id.*

[13]I was very concerned with my evaluation of the errors associated with Mr. Landis' tests. To confirm that there was a problem with cherry picked of data I asked the Panel's expert, Dr. Botrè to review my concerns. His response was that he could not figure out where the data came from. While this is certainly not evidence in the case,

violation of ISL 5.2.6.1.[14]

8. It should be noted, Mr. Landis' legal team spent a large amount of time questioning the various laboratory technicians about the problem associated with the deleted data and the importance of conducting tests in their proper sequence.[15] Ms. Frelat confirmed only the technicians would have known what happened to the deleted data.[16]

9. Thereafter, Mr. Landis' counsel disclosed the evidence demonstrating errors in the document package evidencing cherry picking of data. The errors were evident on the face of the documents. Given this fact, Mr. Landis sustained his burden of proof. Cherry picking did occur and we cannot determine why because those records have been destroyed (i.e., and ISL violation).[17]

10. After sustaining his burden of proof regarding the errors in the document package, it was incumbent upon USADA to come forward with some evidence to prove these errors did not cause the Adverse Analytical Finding.[18] USADA failed to put forward any evidence refuting the errors in the document package or that the errors in the document package did not cause the Adverse

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Dr. Botrè's response is in accord with what both parties agreed, that the Panel could have an expert to explain complicated scientific information. His response confirmed my suspicion of the problem.

[14]ISL 5.2.6.1 states: The Laboratory must have documented procedures to ensure that it maintains a coordinated record related to each Sample analyzed. In the case of an *Adverse Analytical Finding*, the record must include the data necessary to support the conclusions reported (as set forth in Technical Document, Laboratory Documentation Packages)[.] In general, the record should be such that in the absence of the analyst, another competent analyst could evaluate what tests had been performed and interpret the data.

[15]Transcript of Proceeding, *supra*, at pages 556:24-608:17 (testimony of Cynthia Mongongu); *Id.* at pages 689:17-721:13 (testimony of Claire Frelat) (May 17, 2007).

[16] *Id.* at pages 556:24-608:17(testimony of Cynthia Mongongu); *Id.* at p. 713:17-24 (testimony of Clair Frelat) (May 17, 2007).

[17]The majority apparently would place additional requirements on Mr. Landis regarding proving this evidence. Given the testimony, I do not see what additional evidence Mr. Landis could have presented.

[18]World Anti-Doping Code (2003) ¶3.2.1.

Analytical Finding. In fact, as noted in CAS precedent, it is "virtually impossible to prove a negative fact."[19]

11. In the context of all the facts and circumstances surrounding this case, the errors in the LNDD's document package is most disturbing. If deliberate, athletes should not be victims of such improper behavior.

12. Further, the LNDD could not determine the isotopic value of the 5 Alpha AC within the acceptable scientific range of error in four instances during the testing of Landis' sample.[20] The fact that the LNDD could not properly determine the isotopic value for 5 Alpha AC is additional persuasive evidence that LNDD's testing was inaccurate.

C. WADA'S "Code of Ethics" for Laboratory Directors has been Interpreted and Enforced as an Unnecessary Obstacle to the Search for Truth

13. From the perspective of "safeguarding the interest of athletes," any anti-doping system must be held accountable, like the athletes.[21] If there are flaws in procedures for testing, as evidenced above, those flaws should be immediately disclosed and admitted in an adjudicative proceeding. Drug testing agencies should not be playing hide the ball when athletes' careers are on the line.

14. It was disclosed during the hearing that the Laboratory Directors are bound by an Ethics Code of Conduct that has been interpreted to preclude them from disclosing the errors of one of their fellow laboratories on behalf of an athlete. In other words, if a Laboratory Director knew that another laboratory had made an error and that error was causing an innocent athlete to be convicted

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[19] *UCI v. Landaluce*, CAS 2006/A/1119, p. 23, at ¶111, Exhibit GDC0189 (translated GDC0215).

[20] Closing Statement on Hehalf of Floyd Landis at pages 39, 40, 134 and 136, U.S. Anti-Doping Agnecy vs. Floyd Landis (30 190 00847 06) (May 23, 2007).

[21] *Quigley v.International Shooting Union*, CAS 94/129 (The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves).

of a doping offense, they could not testify on behalf of the athlete and disclose the error.[22] The relevant portion of the Laboratory Code of Ethics states the following:

> **Conduct Detrimental to the Anti-Doping Program**
>
> The Laboratory personnel shall not engage in conduct or activities that undermine or are detrimental to the anti-doping program of WADA, an International Federation, a National Anti-Doping Organization, a National Olympic Committee, a Major Event Organization Committee, or the International Olympic Committee. Such conduct could include, but is not limited to, conviction for fraud, embezzlement, perjury, etc., that would cast doubt on the integrity of the anti-doping program.[23]

15. While this provision does not expressly preclude a Laboratory Director from testifying on behalf of athletes, the testimony of the Laboratory directors made it clear that is in fact how the provision has been interpreted and enforced. Dr. Ayotte admitted that because of this provision she would not testify for an athlete even if she knew that a WADA Accredited Laboratory made a mistake.[24] Dr. Catlin testified that he was rebuked by WADA for testifying on the behalf of an athlete, and this was the case even though USADA had (rightfully) requested that he testify.[25]

16. This testimony establishes that WADA's purported "Code of Ethics" unnecessary operates as an obstacle to the search for truth. It may even, in practice, improperly lead to the withholding of evidence and/or intimidate a qualified expert witnesses from testifying truthfully in proceedings such as these. This is particularly likely in the context of cross examination. The Laboratory Director could feel compelled to shade his or her testimony, or outright fail to accurately testify

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[22] Transcript of the Proceeding, *supra*, at pages 834:23-837:15 (testimony of Dr. Christiane Ayotte) (May 17, 2007); *Id.* at pages 1204:17-1206:17;1241:22-1244:20 (testimony of Don H. Catlin, M.D.) (May 19, 2007).

[23] ISL, Annex B- Laboratory Code of Ethics (2004).

[24] Transcript of the Proceeding, *supra*, at pages 835:18-837:9 (testimony of Dr. Christiane Ayotte) (May 17, 2007).

[25] *Id.* at pages 203:17-22;1205:21-1206:17;1241:22-1244:20 (testimony of Don H. Catlin, M.D) (May 19, 2007).

concerning the impact of a WADA Accredited Laboratory's error.

17. The Laboratory Directors in this case were Dr. Ayotte, Dr. Wilhelm Schänzer and Dr. Catlin. They all testified that they had carefully reviewed the documents provided by the LNDD. None of them disclosed the problem associated with the cherry picking of data.

D. <u>LNDD Failed to Follow ISL Procedure testing for three ions in the T/E Ratio test</u>

18. Another example that raises the credibility issue with respect to the Laboratory Directors was the actual testimony of Dr. Ayotte. Regarding the T/E Ratio test performed by LNDD on Landis' stage 17 sample (alleged positive test), Dr. Ayotte testified that the T/E value was "reported on good scientific basis and ground.[26]" During her cross-examination, Dr. Ayotte was forced to admit that the LNDD Laboratory had in fact neglected to identify three-ions in the T/E Ratio test as required by the International Standard for Laboratories ("ISL").[27] This of course is another examples of the LNDD Laboratory failing to abide by the ISL in its testing procedures in this case.[28]

19. It obviously is not in the best interest of athletes to have a Laboratory Director testify that it is acceptable to ignore scientifically valid procedures required by the ISL. Even the majority had to admit this point. Dr. Ayotte's testimony was outrageous and a perfect example of why a Laboratory Director's testimony regarding potential errors, or the lack thereof, is highly suspect. The interpretation of WADA's Code of Ethics certainly does not "safeguard the interests of the athletes."

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[26] *Id.* at p. 802:8-14. (testimony of Dr. Christiane Ayotte) (May 17, 2007).

[27] *Id.* at pages 939:18-940:21.

[28] WADA TD2003IDCR: Selected Ion Monitoring Mode. In some cases, it may be necessary to monitor selected ions in order to detect the substance at the Minimum Required Performance Limits. When selected ions are monitored, at least three diagnostic ions must be acquired. The relative abundance of a diagnostic ion shall preferably be determined from the peak area or height of integrated selected ion chromatograms.

20. Also, the T/E ratio test is acknowledged as a simple test to run. The IRMS test is universally acknowledge as a very complicated test to run, requiring much skill. If the LNDD couldn't get the T/E ratio test right, how can a person have any confidence that LNDD got the much more complicated IRMS test correct.

E. <u>LNDD Did Not Have A Proper Chain of Custody for the Samples of Mr. Landis</u>

21. Having an impeccable chain of custody is necessary to "ensure that the urine tested suffered no contamination, tampering, or mislabeling."[29] "On request the laboratory must be able to give exact documentation on details such as where a certain sample was located at a given time and the identity of the person handling the sample at the time in question."[30] The ISL 3.2 defines Laboratory Internal Chain of Custody as follows:

> Documentation of the sequence of Persons in possession of the Sample and any portions of the Sample taken for Testing. [Comment: <u>Laboratory Internal Chain of Custody</u> is generally documented by a written record of the date, location, action taken, and the individual performing an action with a Sample or <u>Aliquot.</u>][31]

22. There were numerous examples of problems with the chain of custody in Mr. Landis' case.[32] One example clearly stands out.[33] The Exhibit, USADA 0235, contains a portion of what purports to be the LNDD's internal chain of custody for Mr. Landis' sample.[34] On July 22, 2006 the

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[29]Catlin, Cowan, Donike et al., "Testing Urine for Drugs, *International Federation of Clinical Chemistry* (1992), Exhibit GDC0219-0232.

[30]*Id.*

[31]The World Anti-Doping Code, International Standards For Laboratory, Version 4.0 (August 2004), ¶3.2.

[32]Landis' Proposed Finding of Fact and Conclusions of Law, *supra*, at pages 47-50.

[33]Transcript of Proceeding, supra, at pages 661-662:2.(testimony of Cynthia Mongongu).

[34]*Id*.

document shows that Ms. Mongongu had possession of the sample for IRMS aliquot testing.[35] She testified that at 11:25 she gave the sample to Esther Cerpolini.[36] She further testified that Ms. Cerpolini performed a density test and pH test on the sample and placed it back in storage.[37]

23. The laboratory internal chain of custody has no record of a density or pH test being done on the sample. Further, the document does not show Ms. Cerpolini having possession of the sample until more than an hour after the time testified to by Ms. Mongongu.

24. This example best illustrates that the documents used to show the chain of custody for Mr. Landis' sample have no relationship to what actually happened to the samples in this Laboratory. Further, there are also other significant gaps regarding the sample in the laboratory's internal chain of custody that are too numerous to mention. The chain of custody was severely deficient compared to examples of the UCLA Laboratories' chain of custody documentation.

25. When you have flaws that are as obvious as the flaws in LNDD's document package in this case and you combine that with the fact that actions were taken on Mr. Landis' sample that are not recorded, then I do not see how you can state with confidence what happened to those samples at any particular time. Flaws of this magnitude in the internal chain of custody render's any results from tests done on those samples unreliable.

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[35]*Id.*

[36]*Id.* at p. 539:1-14.(testimony of Cynthia Mongongu).

[37]*Id.*

F. LNDD's Failure to Properly Record Forensic Corrections Makes the Documents Unreliable

26. With respect to changes in documents, WADA TD2003LCOC states the following:

> Any forensic corrections that need to be made to the document should be done with a single line through and the change should be initialed and dated by the individual making the change. No white out or erasure that obliterates the original entry is acceptable. (emphasis added)[38]

27. Mr. Landis proved beyond a reasonable doubt that the LNDD failed to abide by this ISL for documents found in USADA Exhibit 24 page numbers 0200 and 00009. Corrections were made to entries on these documents without any initials and in some cases there were white outs or erasures that obliterated the original entry. In one case, there was even an apparent mislabeling of the number of the sample.

28. Mr. Landis' expert, Dr. Goldberger, testified to what is obvious. In the context of laboratory testing, misnumbering in a document package is a fatal flaw.[39] It should raise tremendous concern.[40] When your document package contains documents with a different sample number, documents with strike outs, documents without proper forensic corrections, and a completely unreliable chain of custody, you do not have a reliable documentation package.

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[38]WADA Technical Document - TD2003LCOC, Laboratory Internal Chain of Custody, p. 1 (GDC0233).

[39]Transcript of the Proceedings, *supra*, at p. 1046:23-1047:21(testimony of Dr. John K. Amory) (May 18, 2007).

[40]*Id.*

G. Additional Potentially Fraudulent Documents

29. Mr. Landis produced evidence that suggested that the LNDD fraudulently created a document to assist it in verifying its results. This document can be found at LNDD0440. It should be a reference solution log maintained contemporaneously from January 19, 2006 through June 26, 2006. There are cross-outs (improper corrections) that indicate the dates were changed in two entries from March 16, 2007 to March 6, 2006. The handwriting on the document was the same over the period of time covered by the document. It is unlikely the same person would be making all the entries given the time period covered by the document.

30. Mr. Landis' allegation of fraud is serious and demanded the most forceful rebuttal by USADA. USADA failed to challenge Mr. Landis' allegation of this fraudulent document.

H. LNDD Did Not Abide by its Legal and Ethical Obligation of Confidentiality

31. At every stage of testing, the results from the testing of Mr. Landis' samples were leaked to the media. ISL, Annex B- Laboratory Code of Ethics states the following:

> 1. Confidentiality - The heads of Laboratories, their delegates and Laboratory staff shall not discuss or comment to the media on individual results prior to the completion of any adjudication without consent of the organization that supplied [the] sample to the Laboratory and the organization that is asserting the *Adverse Analytical Finding* in adjudication.[41]

32. With respect to the testing of Mr. Landis' B samples[42] from the other stages of the Tour de France that occurred on April 16, 2007, within twenty-four hours after the LNDD obtained the results, and before anyone other than the LNDD had the results, the results of the B sample tests were leaked to the media. This not only breached LNDD's obligation of confidentiality under the

[41]ISL, Annex B-Laboratory Code of Ethics, p. 54 (USADA Exhibit 8).

[42]Other problems with the retesting of the B samples are discussed below.

WADA Code, it directly violated this Panel's order.[43]

33. In addition to the breach of its ethical duty, the more serious aspect of the leak demonstrates LNDD's attitude towards Mr. Landis. Leaking this information was clearly meant to damage Mr. Landis' credibility before an independent tribunal had the opportunity to evaluate the evidence. This shows bias in a laboratory that should be neutral. More importantly, it shows malice. This malice brings into question everything the Laboratory has done in this case. It is amazing how many things the LNDD did wrong in this case, including precluding Mr. Landis' experts from observing some of the beginning of the processing of the B samples from the other stages and locking out Mr. Landis' experts from the last portions of the processing of Mr. Landis' B samples from the other stages. All of these acts were in direct violation of this Panel's order.

34. The news organization that reported Mr. Landis' A sample positive was the same news organization that reported the results the B samples from the other stages in April of 2007. Did the LNDD leak the results of the A sample to the media? If so, this means the LNDD knew the identity of Mr. Landis in violation of the WADA Code. Having to ask these questions evidence serious credibility issues surrounding the entire testing process in this case.

[43]I have presided over a number of cases with USADA where there was a confidentiality ruling. USADA has always faithfully upheld their ethical and legal obligation of confidentiality. This is the only case where confidentiality has been breached. I do not believe that USADA leaked any confidential information in this case.

I. **The LNDD Failed to Provide Complete Documentation of the Adverse Analytical Findings for the Additional Tests done on the B Samples from Stages 11,15,19 and 20.**

35. The International Standards define an "Adverse Analytical Finding" as follows:

> A report from a Laboratory or other approved Testing entity that identifies in a Specimen the presence of a Prohibited Substance or its Metabolites or Markers (including elevated quantities of endogenous substances) or evidence of the Use of a Prohibited Method.[44]

36. USADA's witness, Ms. Mongongu, testified that the testing of stages 11, 15, 19, and 20 for the B samples of Mr. Landis' Tour de France race were "Adverse Analytical Findings."[45] Without question, USADA submitted a report to this Panel on these "Adverse Analytical Finding" for the B samples from the other stages.

37. When submitting such reports, ISL, Section 7.0, titled "Requirements for supporting an Adverse Analytical Finding in the Adjudication Process," mandates the following requirement for Laboratories:

> In support of ***any*** Adverse Analytical Finding the Laboratory is required to provide the Laboratory Documentation Package described in detail in the Technical Document on Laboratory Documentation Packages.[46] (emphasis added)

38. The WADA Technical Document - TD2003LDOC ("Documentation Package"), mandates that ***"All Documentation Packages provided shall contain the following information: . . . "A" Sample Confirmation Procedure Data . . . . [and the] "B" Sample Confirmation Procedure***

[44]ISL, Annex B-Laboratory Code of Ethics, *supra*, at p. 8, §3.1 (USADA Exhibit 8).

[45]Transcript of Proceeding, supra, at p. 665.(testimony of Cynthia Mongongu).

[46]ISL, Annex B-Laboratory Code of Ethics, *supra*, at p. 46, § 7.1 (USADA Exhibit 8).

Data." (emphasis added).[47] The International Standards define a "Confirmation Procedure" as follows:

> An analytical test procedure whose purpose is to identify the presence of a specific Prohibited Substance in a Sample. [Comment: A Confirmation Procedure may also indicate a quantity of Prohibited Substance greater than a threshold value or quantify the amount of a Prohibited Substance in the Sample.][48]

39. Regarding the "A" Sample Confirmation, the International Standards, ¶ 5.2.4.3.1 states:

> Presumptive identification from a Screening Procedure of Prohibited Substances, Metabolite(s) of a Prohibited Substance, or Marker(s) of the Use of a Prohibited Substance or Method must be confirmed using a second Aliquot(s) taken from the original "A" Sample.[49]

40. WADA Code Article 6.4 titled, "Standards for Sample Analysis and Reporting" provides:

> Laboratories shall analyze Doping Control Samples and ***report results*** in conformity with the International Standard for laboratory analysis. (emphasis added)[50]

41. The majority ruled that the results from the B samples from the other stages were not Adverse Analytical Findings. That means the results from the A sample of those stages were not produced. If an IRMS test was run on the A samples from the other stages they were certainly negative.

42. The record demonstrates that the LNDD had enough of the A Sample urine for stage 17 to conduct the following screens: stimulants, diuretics, corticosteroids, EPO, and anabolic steroids.[51]

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[47] WADA Technical Document - TD2003LDOC (2004) (USADA Exhibit 11).

[48] ISL, Annex B-Laboratory Code of Ethics, *supra*, at p. 10, ¶ 3.2 (USADA Exhibit 8).

[49] *Id*. at p. 20, ¶ 5.2.4.3.1(USADA Exhibit 8).

[50] World Anti-Doping Code (2003), Article 6.4

[51] USADA Proposed Finding of Fact and Conclusion of Law, supra, at p. 4.

Thereafter, on the A Sample the first T/E confirmation attempt was rejected.[52] LNDD began the IRMS confirmation on the A Sample with the first of three steps in the LNDD IRMS test.[53] On July 23, 2006, LNDD began a second attempt at T/E confirmation from a new urine aliquot from the A Sample.[54] LNDD also did the second and third of the three steps for the IRMS analysis.[55] The A sample in stage 17 provided enough urine to in essence perform tests for everything. Given the amount of tests done on the stage 17 A sample, why did the LNDD run out of urine for the A samples in the other stages?

43. USADA informed counsel for Mr. Landis in a telephone conference on January 22, 2007 that one of the A Samples was subjected to IRMS testing.[56] If this negative IRMS test was from one of the stages that later tested positive, one way or the other, you have additional evidence of laboratory error. In my view, the failure to provide the evidence for all the negative screens in testing the negative A samples renders the evidence of the testing of the B samples for the other stages highly suspect.

44. This is particularly the case when you consider that in contravention of the Panel's order, Mr. Landis' experts were prohibited from observing portions of the beginning of the testing of the B samples and the ending of the testing of the B samples. While the panel's expert, Dr. Botrè did not

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[52]*Id.*

[53]USADA Proposed Finding of Fact and Conclusion of Law at p. 5, U.S. Anti-Doping Agnecy vs. Floyd Landis (30 190 00847 06) (June 28, 2007).

[54]*Id.*

[55]*Id.*

[56]Marice Suh and Howard Jacobs, *Opening Brief In Re: Retesting of Urine Specimens That Have Previously Tested Negative For Prohibited Substances,* U.S. Anti-Doping Agnecy vs. Floyd Landis (30 190 00847 06) (February 5, 2007).

provide evidence in the case, even he voiced amazement and concern that Mr. Landis' team was locked out of portions of the B sample testing. Barring Mr. Landis' experts from viewing portions of the B sample testing in the other stages raises many questions concerning the credibility and reliability of the results. It certainly destroys any reliability of the blind nature of the testing for those samples.

J. <u>The Document Package Supplied in Support of an Adverse Analytical Finding Does Not Comport with Known Science</u>

1. The Credibility of Dr. Amory was above reproach.

45. There were a number of individuals who testified in these proceeding. While some or all of their testimony may have been truthful, I had some concerns about the testimony of the witnesses on both sides. With respect to USADA, obviously, I had concerns with all USADA's witnesses that were or are Laboratory Directors given WADA "Code of Ethics." Dr. Brenna is being paid over a million dollars by USADA to do research. The laboratory technicians obviously wanted to support their findings, although it appeared that their testimony actually supported Mr. Landis' assertions that the tests were not reliable. With respect to Mr. Pap, he obviously testified in an attempt to obtain a reduced sanction, otherwise, USADA would have announced his sanction right after his settlement was communicated to his independent hearing panel months before this hearing. With respect to Mr. Lemond, it appeared that aside from any sincere concerns he may have had concerning cycling, his testimony was irrelevant.

46. With respect to Mr. Landis's witnesses, Dr. Davis appeared to give misleading testimony regarding the version of one of the computer programs he testified about. I am not sure that Dr.

Meier-Augenstein got his retention time argument correct.[57] Although I do believe his testimony was honest and straight forward. Dr. Goldberger seemed credible especially considering that UCLA was interested in discussing Dr. Catlin's former position with him.

47. The one witness that stood out in my mind, really stood out, was Dr. John K. Amory. He has the experience, background and independence to assign great weight to his testimony. Dr. Amory is widely recognized as an expert in the field of Andrology. He has received the Young Andrologist Award from the American Society of Andrology.[58] His work requires him to review the scientific research and articles in the area of endocrinology and andrology.[59] Significantly, Dr. Amory is a member of USADA's independent anti-doping review board.[60] That fact is jaw dropping. He is one of USADA's experts when it comes to viewing document packages related to doping offenses.

48. Dr. Amory was not a paid witness.[61] He was testifying because he felt something was wrong. Dr. Amory testified the IRMS test results for the stages 11, 15, 19, 20 (the additional B samples tested) and stage 17, the stage in question in this case, are inconsistent with known science.

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[57]Dr. Botrè, the panel's expert, opined that he got the times wrong because he failed to take into account they were using two different machines for the retention time.

[58]Transcript of the Proceedings, *supra*, at pages 1539:1-1543:18 (testimony of Dr. John K. Amory).

[59]*Id.*

[60] *Id.*;Having someone with this level of integrity in USADA's program is commendable. My only fear is that given Dr. Amory's testimony in this case he will be (1) removed from his position, (2) not reinstated when his term ends, or (3) there will be rules written to prohibit him or others in his position from testifying on behalf of athletes when their conscious dictates that they take such action. These likely responses obviously would not "safeguard the interest of athletes."

[61]Transcript of the Proceedings, *supra*, at pages p. 1539:1-1545:13-15 (testimony of Dr. John K. Amory).

2. The T/E test results do not match the IRMS test results.

49. For example, the stage 17 T/E test showing the alleged 11:1 ratio is evidence that Mr. Landis was a high-mode individual.[62] Therefore, in the other stages where USADA alleges Mr. Landis tested positive and was using testosterone, his T/E Ratio should have been elevated as well.[63] However, they were normal (2.5, 1.8, 2.5 and 1 respectively). As Dr. Amory testified, you cannot have it both ways.[64] Either he is high mode or low mode.[65] In either case, the results from these stages do not comport with known science, .i.e., they are not reliable.[66]

50. This holds true for the IRMS tests as well. In known studies when there is a difference in the delta delta values enough to have a positive test, the T/E ratio test should corroborate the IRMS test.[67] That has not happened in this case. The only T/E ratio that is high is Mr. Landis' stage 17 sample. There are obvious problems with that sample. The T/E ratios for the other stages are normal.

3. The metabolites identified in Landis' samples are not behaving according to known science.

51. Also, regarding the IRMS test, in the normal case, the metabolites 5-alpha diol and 5-beta diol should show a decrease in tandem with the administration of exogenous testosterone and an increase in tandem when the exogenous testosterone clears the athletes system.[68] The stage 17, July

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[62] *Id*. at pages. 1564:10-1570:8; 1585:19-1589:24.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at pages 1581:18 -1583:24.

[68] *Id*. at pages 1578:6-1580:20.

20, 2006 alleged Adverse Analytical Finding in this case does not show these two metabolites acting in tandem.[69] While the 5aDiol minus 5pDiol is positive, the 5bDiol minus 5pDiol is negative by a significant margin.[70] Likewise, the stage 19, July 22, 2006 alleged Adverse Analytical Finding does not show these metabolites acting in tandem.[71] Dr. Amory found it particularly disturbing that on July 23, 2007, the T/E ratio was 1 and there was a marked discrepancy between the 5-alpha and 5-beta diol.[72]

52. This would hold true for the metabolites Andro minus 11-keto and Etio minus 11-keto, you would likewise expect to have someone with consistent values.[73] Yet there is inconsistency in these values as well.[74] When you consider all the errors and ISL violations in this case, the fact that the results also do not comport with known science is dispositive. I cannot be comfortable satisfied that LNDD's results are correct.

4. The Evidence Demonstrate without question that Mr. Landis did not engage in a pattern or practice of doping using testosterone.

53. USADA argued that Mr. Landis was involved in a pattern and practice of doping using testosterone. USADA's expert witness, Dr. Schänzer, testified that even with intermittent use you would see suppression in elements of an athlete's steroid profile.[75] Dr. Amory testified that had Mr.

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[69]*Id.* at pages 1585:19 -1586:4.

[70]Exhibit GDC01363

[71]Transcript of the Proceedings, supra, at p. 1586:5-18 (testimony of John K. Amory, M.D).

[72]*Id*. at p. 1588:4-14.

[73]*Id.* at p. 1588:14-22.

[74]*Id.*

[75]*Id*. at pages 1150:23-1153:16 (testimony of Wilhelm Schanzer, Ph.d.) (May 19, 2007).

Landis been an habitual abuser of testosterone, his luteinizing hormone values would have been suppressed.[76]

54. The testimony of both experts are consistent, had Mr. Landis been involved in a pattern and practice of doping using testosterone, some of the hormones his body naturally produces would have been suppressed. That suppression would have show up in Mr. Landis' longitudinal steroid profile. Mr. Landis' longitudinal steroid profile shows no evidence of suppression. In fact, USADA's expert witness, Dr. Catlin, testified that Mr. Landis' steroid profile over the period of four years up until the time of the one test was "very ordinary." [77]

K. <u>Even Using LNDD's Questionable Numbers Landis' Sample Would have been Reported Negative By a Reputable Laboratory</u>

55. The evidence in the case proves that LNDD did not properly apply its measurement of uncertainty in reporting Mr. Landis' B sample from stage 17 positive. The initial laboratory report stated that the Andro minus 11Keto and 5aDiol minus 5pDiol delta delta values were positive.[78] Mr. Landis argued that the LNDD committed a laboratory error because the Andro minus 11Keto delta delta value was in fact negative. Mr. Landis alleged that the LNDD had failed to take into consideration the measurement of uncertainly.

56. In its pre-trial brief, USADA attempted to refute Mr. Landis' argument by stating that the LNDD did not have to take into account the measurement of uncertainty with respect to delta delta values for Andro minus 11Keto.[79] USADA's own expert witness. Dr. Brenna, proved USADA's

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[76]*Id.* at pages 1550:1-1552:13 (testimony of John K. Amory, M.D).

[77]Id. at pages 1255:1-1256:15(testimony of Don H. Catlin, M.D.).

[78]USADA Exhibit 25, 0352.

[79]Transcript of the Proceedings, supra, at pages 353:12-358:13 (testimony of J. Thomas Brenna, Ph.D.) (May 15, 2007).

argument was spurious.[80] It was following Dr. Brenna's testimony that Ms. Mongongu gave what I considered a self-serving testimony in contradiction of the LNDD's document package testifying that the Andro minus 11Keto delta delta values were not reported positive because the numbers were not above the laboratory's measurement of uncertainty.[81]

57. The measurement of uncertainty calculation in this case required that in order for a delta delta value to be reported positive, the difference had to exceed minus 3.8. The Andro minus 11Keto delta delta value was only minus 3.51. LNDD's SOP required that the measurement of uncertainty be calculated. This is another example of the LNDD violating the ISL because it did not apply the measurement of uncertainty to the Andro minus 11Keto delta delta value as required by its SOP and sound scientific practice. This is one case where it is not possible to argue that the violation of the ISL did not case the false Adverse Analytical Finding.

58. Mr. Landis had diligently requested the positivity criteria for the LNDD laboratory for reporting a positive test under an IRMS analysis. He wanted to know whether you needed to identify one, two or three metabolites' delta delta values as positive. The only response from LNDD was that they followed the WADA Criteria. The WADA Criteria is so vague that a laboratory could have done any of the above. This is likely why there is no uniformity in the various WADA laboratory's positivity criteria for IRMS tests. I really wonder whether the LNDD would have reported Mr. Landis' sample positive had they properly calculated the measurement of uncertainty in the beginning and found that only one metabolite had a delta delta value above the 3 per mil threshold.

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[80]*Id.*

[81]Id. at pages 448:12-450:19 (testimony of Cynthia Mongongu) (May 15, 2007).

59. Nevertheless, Mr. Landis proved beyond a reasonable doubt that the UCLA Laboratory would have declared his stage 17 sample negative even using the flawed data from the LNDD laboratory. UCLA's positivity criteria requires the identification of at least two metabolites.[82] It states the following:

> A Positive report means that the delta values for both M1 and M2 are at least three standard deviations (SD) units less that the mean (average) of a group of 73 normal males, and the delta value for Pdiol is within 3SD of the mean of normal males. In addition. . .the two differences are more than 3 SD from the range of normal values. These criteria . . . **all must be met** for the sample to be declared positive.[83]

There must be some sound scientific reason why a reputable laboratory like UCLA mandates the identification of two metabolites to have a positive test. Because Mr. Landis conclusively proved that more than one reputable laboratory would have declared his stage 17 sample negative, I cannot be comfortably satisfied that he tested positive and USADA has failed to sustain its burden of proof.

III.

CONCLUSION

60. As this case demonstrates, even when an athlete proves there are serious errors in a laboratory's document package that refute an Adverse Analytical Finding, it will be extremely difficult for an athlete to prevail in these types of proceedings. Therefore, it is imperative that WADA Accredited Laboratories abide by the highest scientific standards.

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[82] The Australia Laboratory also requires that two metabolites surpass the threshold mark. Landis' Stage 17 sample would also have been reported negative in the Australia Laboratory.

[83] Exhibit GDC0451-0452 (emphasis added).

obligates it to inflict such harm, it should be obligated to get it right--all of it. As athletes have strict liability rules, the laboratories should be held strictly liable for their failure to abide by the rules and sound scientific practice.

62. Because everyone assumes an athlete who is alleged to have tested positive is guilty, it is not fashionable to argue that laboratories should comply with strict rules. However, if you are going to hold athletes strictly liable with virtually no possibility of overcoming a reported alleged positive test even in the face of substantial and numerous laboratory errors, fairness and human decency dictates that strict rules be applied to laboratories as well. To do otherwise does not "safeguard the interest of athletes."

63. WADA should be writing rules that mandate the highest scientific standards rather than writing rules for a race to the bottom of scientific reliability so convictions can be easily obtained, as this case demonstrates. Given the plethora of laboratory errors in this case, there was certainly no reliable scientific evidence introduced to find that Mr. Landis committed a doping offence.

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